



National Grain and Feed Association

Arbitration Decision

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April 4, 2013

Arbitration Case Number 2551

Plaintiff: Bartlett Grain Company L.P, Kansas City, Mo.

Defendant: Sunburst Farms Partnership, Tribune, Kan.

Statement of the Case

This arbitration case involved a dispute between Bartlett Grain Company L.P. (Bartlett) and Sunburst Farms Partnership (Sunburst) regarding two contracts for the purchase and sale of a total of 230,000 bushels of hard red winter wheat.

The parties first entered into contract number 680494, dated Feb. 16, 2010, in which Sunburst agreed to deliver 60,000 bushels of U.S. No. 1 hard red winter wheat by rail “*FOB Sunburst Farms - Walkinghood, KS*” between March 1 and March 30, 2010, and Bartlett agreed to pay for the wheat at \$4.50 per bushel. The parties then entered into contract number 24731, dated July 22, 2010, in which Sunburst agreed to deliver another 170,000 bushels of U.S. No. 1 hard red winter wheat by rail “*FOB Walkingwood, KS*” between Jan. 1 and March 31, 2011, and Bartlett agreed to pay for the wheat at \$5.00 per bushel.

Both Sunburst and Bartlett signed the purchase confirmations for contracts 680494 and 24731, and neither party disputed the validity of these contracts.

According to Bartlett, delivery of wheat under the first contract was repeatedly delayed and extended at Sunburst’s request based upon a variety of stated reasons, including alleged problems associated with insect damage, weather conditions, manpower shortages, issues between Sunburst and rail carriers, and the condition of a rail siding at Sunburst’s facility. The parties signed confirmations that extended this contract and some wheat was delivered under the first contract.

After the extended delay of deliveries under the first contract, on Dec. 23, 2010, the parties modified the agreements by a memorandum, dated Dec. 23, 2010, whereby delivery of the

170,000 bushels under contract number 24731 would be completed in January 2011 and delivery of the remaining 30,000 bushels under contract number 680494 would be completed no later than March 15, 2011. From Dec. 27, 2010 through January 7, 2011, 65,348 bushels of wheat were delivered under the contracts. However, deliveries subsequently ceased and communications between the parties broke down.

On Jan. 18, 2011, Bartlett issued to Sunburst a Demand for Adequate Assurance citing the repeated delays, cessation of deliveries, lack of communication and responsiveness by Sunburst, and the large difference between the contract prices and then current market prices. Among the alternatives offered by Bartlett at that time upon which the parties might proceed was that if Sunburst would load at least 20 trucks per day, then Bartlett would provide the trucks at its own expense thereby assuming the costs of transportation.

Pursuant to NGFA Grain Trade Rule 28, Bartlett subsequently cancelled the contracts and calculated its damages based upon market prices on the close of the business day following Sunburst’s repudiation of the contracts (Jan. 21, 2011) as follows:

Contract No. 24731

170,000 bushels contracted
65,348 bushels delivered
104,652 bushels not delivered

\$5.00 contract price
\$8.21 market price
\$3.21 price difference

\$335,932.92 bushels not delivered (x) price difference

Contract No. 680494
60,000 bushels contracted
27,514 bushels delivered
32,486 bushels not delivered

\$4.50 contract price
\$8.21 market price
\$3.71 price difference

\$120,523.06 bushels not delivered (x) price difference

Bartlett claimed total damages of \$272,015.90 (\$456,455.98 for cancellation of both contracts less \$184,440.08 for payment withheld for the delivered bushels).

Sunburst claimed that Bartlett wrongfully withheld \$184,440.08 for the delivered grain and consequently breached the agreement between the parties. Sunburst disputed the application of the terms for adequate assurances and set-offs in the contracts confirmations. Sunburst claimed that Bartlett's cancellation of the contracts was in violation of contract terms and conditions.

The Decision

After a thorough review of the extensive arguments and documents presented by both Sunburst and Bartlett, the arbitrators concluded that Sunburst failed to fulfill its obligations to deliver the grain under the agreements between the parties. The arbitrators determined that during the course of the dealings between the parties Bartlett was very accommodating to Sunburst in an effort to complete the purchase and sale of the contracted grain and to avoid this dispute. Bartlett took notable measures to accommodate Sunburst with the contracted delivery periods. After specified unforeseen obstacles arose for Sunburst, Bartlett even provided alternate delivery points with supplemental trucks at its own cost to further accommodate Sunburst. According to the terms of the original contracts, Sunburst was obligated to deliver the grain FOB by rail.

When the obstacles first arose, such as Sunburst's inability to deliver grain at the contracted level of quality, it was submitted that delay of delivery was necessary so that Sunburst could take additional steps to raise the level of grain quality. However, over time it became evident that Sunburst would continue to present various reasons for not delivering under the contracts. Sunburst first attempted to apply product of inadequate quality that did not meet the contracted grade specifications. Sunburst then indicated that its operations were affected by problems with a rail siding at its facility. The arbitrators determined that Sunburst's difficulty with the rail siding was not Bartlett's responsibility nor was it Bartlett's responsibility to ensure that Sunburst had adequate facilities to load out the contracted grain. The arbitrators noted that even after Bartlett had reason to doubt Sunburst's intent to deliver under the contracts, Bartlett became even more accommodating by offering alternative delivery points by trucks to be provided by Bartlett at its own expense.

The arbitrators concluded that the documented communication between the parties throughout this process demonstrated that Bartlett's preference was not for this case to go to arbitration but, instead, to take delivery of the grain pursuant to the contracts and to continue with business as usual.

With respect to the Dec. 23, 2010 handwritten "memorandum of agreement" between the parties, the arbitrators noted that

although it was an irregular and unconventional approach, it was to be considered in conjunction with the original contracts between the parties. This memorandum changed the order in which the grain would be applied (i.e., delivered grain would be applied under contract no. 24731 for 170,000 bushels). The memorandum also changed the delivery point and mode of transportation in that the new delivery point was Fowler, CO by truck rather than by rail delivery mode. This memorandum also provided for Sunburst to receive payment for grain delivered in 25,000 bushel increments. After thoroughly reviewing the memorandum, the arbitrators concluded that the other terms of the original contracts with the contracted prices continued to apply to the parties' rights and obligations.

The arbitrators concluded that Sunburst was the first to breach the agreement between the parties and that Bartlett was entitled to withhold payment to Sunburst under these circumstances. The arbitrators also determined that throughout this course of dealings Bartlett operated in accordance with the NGFA Trade Rules and the contract terms, including that Bartlett acted reasonably in demanding adequate assurances from Sunburst.

The arbitrators determined the issuance by Bartlett of a Demand of Adequate Assurance on Jan. 18, 2011, was fully justified. In particular, the arbitrators referred to the following provision in the contracts between the parties:

10. Adequate Assurances. When the prevailing market price for a commodity rises above the Contract price or Buyer has reasonable grounds for insecurity with respect to Seller's performance, Buyer may demand adequate assurance of Seller's performance. Buyer may demand payment from or set off funds in its possession due to Seller up to an amount equal to the difference between the Contract price and the then prevailing market price for the commodity or other assurance of performance. Seller shall provide such adequate assurance within 48 hours of the receipt of such a demand. Seller's failure to provide adequate assurance shall constitute Seller's repudiation of this Contract. ...

The arbitrators noted that Sunburst did not respond to Bartlett's demand pursuant to the contract terms, and that Bartlett confirmed Sunburst's repudiation of the contracts by letter on Jan. 26, 2011. Particularly given the delays and suspension of deliveries and significant volatility in the market, the arbitrators

determined that the conditions set forth in the unambiguous contract terms were satisfied. The arbitrators further determined that Bartlett was entitled to withhold and set-off the funds pursuant to the applicable contract terms.

The Award

Therefore, the arbitrators awarded \$272,015.90 to Bartlett for cancellation charges under the contracts less the amount withheld for the delivered bushels, plus interest from Jan. 21, 2011 through Dec. 31, 2012, at the rate of 3.25% per annum, pursuant to NGFA Arbitration Rule 8(m), for a total of \$280,373.73. The arbitrators also determined that because the Dec. 23, 2010 memorandum provided for payment to Sunburst in 25,000 bushel increments, Sunburst was due \$3,840.69 for interest on \$125,000 at the same rate and for the same period, resulting in a total award due at present to Bartlett of \$276,533.04.

The arbitrators further determined that interest would continue to accrue on this award at the rate of 3.25% from the date of this decision until the award is paid.

Submitted with the unanimous consent of the arbitrators, whose names appear below:

Kevin Gray, *Chair*

Grain Division Marketing and Operations Manager
AgVantage FS
Monticello, IA

Zachary Beaudry

General Manager
Hallock Cooperative Elevator Co.
Hallock, MN

Lynn Krueger

Manager of US Purchasing Commodities
Corn Products International Inc.
Westchester, IL